IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.416 OF 2006 OF 2006

IN

COMPANY APPLICATION NO.338 OF 2006

IN

COMPANY PETITION NO.01 OF 1982

Everest Fincap Private Limited,)
a company registered under)
the Companies Act, 1956 and)
having its registered office)
at Everest Square, Junction of)
Shradhanand Road and Nehru Road)
Vile Parle (East), Mumbai 400057.) ...Appellant

Versus

The Official Liquidator,)
being the Liquidator of)
Bradbury Mills Limited [in)
liquidation], having his office)
at 5th Floor, Bank of India)
Building, M.G. Road, Fort,)
Mumbai 400 023.) ...Respondent

WITH

APPEAL NO.417 OF 2006

IN

COMPANY APPLICATION NO.434 OF 2006

IN

COMPANY PETITION NO.01 OF 1982

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having its registered office)
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Mr Apsi Chinoy, T.N. Subramaniam, Sr.Advocates, Ms Rajani Iyer, Shrikant Shah and Sheetal Shah i/by M/s. Mehta and Girdharlal for the Appellant in both the Appeals.

Mr S.H. Doctor, Sr. Advocate with B.B. Parekh for the Respondent in both the Appeals.

Mr D.D. Madon, Sr. Advocate i/by N.Shah & Hidyattullah for H.D.F.C. Bank in both the Appeals.

CORAM : KSHITIJ R. VYAS, C.J. & ABHAY S. OKA, J.

DATE : JUNE 13, 2006.

JUDGMENT:

1. By consent of the learned Counsel appearing for the parties, we have taken up the Appeals for

final disposal at admission stage. As both the Appeals arise out of the same Company Petition, the Appeals can be conveniently disposed of by a common judgment.

2. For the purpose of appreciating the submissions made by the learned Counsel appearing for the parties, it will be necessary to briefly refer to the facts of the case leading to filing of these Appeals.

3. By order dated 27th January, 1983 passed in Company Petition No.01 of 1982, a company by the name the Bradburry Mills Ltd. (hereinafter referred to as the said company) was ordered to be wound up and the Respondent was appointed as the liquidator with legal powers under the Companies Act, 1956. Prior to the said order, the United Commercial Bank and the Bank of India filed separate suits against the said Company for recovery of Rs.13.62 crores and Rs.3.19 crores respectively. The Court Receiver was appointed as the Receiver of the property of mortgaged by the said company in favour of the said Banks. In the year 1995 the Respondent- official liquidator received a bid in sum of Rs.53 crores for the property of the Company. However, the said bid was not considered on the ground

that an application for revival of the company was pending for consideration. The suits filed by the United Commercial Bank and Bank of India were transferred to the Debt Recovery Tribunal, Mumbai in the year 2001. After the transfer of the suits, the mortgaged property was placed in possession of Debt Recovery Tribunal Court Receiver.

4. The Defendants in the suits filed by the said Banks approached the Appellant with a proposal of the sale of the land with building of the said company. The Appellants agreed to pay Rs.41 crores for the property. The United Commercial Bank and the Bank of India agreed to receive Rs.22 crores and Rs.5 crores respectively towards their claim against the said company. At that time, the total dues payable to the other creditors were approximately Rs.14 crores. The Appellants agreed to pay the said amount to the Respondent-Official Liquidator. The Appellant agreed to pay such further sum to the Respondent in case the sum of Rs.14 crores paid was not sufficient to satisfy all the claims of the creditors provided such demand was made within six months of the date on which sale was sanctioned by the Debt Recovery Tribunal. The United Commercial Bank filed a Misc. Application before the Debt Recovery Tribunal for sanction of the

sale of the property of the said company in favour of the Appellants. The Respondent-official liquidator was impleaded as a party to the said Application. It appears that the Respondent-official liquidator did not raise any objection to the sale of property in favour of the Appellants. By order dated 31st March, 2005, the learned Presiding Officer of the Debt Recovery Tribunal permitted sale in favour of the Appellants. The paragraph Nos.3 and 4 of the said order reads thus:

> "3. The Everest Fincap Pvt. Ltd. has already paid a sum of Rs.22,00,00,000/- to the Applicant herein and Rs.5,00,00,000/- to Defendant No.10 towards full and final settlement of their claims against the 1st Defendant. Over and above this amount, he has undertaken to pay 14,00,00,000/- towards the other statutory liabilities with further undertaking to pay anything over and above that pursuant to the order of Official Liquidator, if the official liquidator makes the demand within 6 months. Taking into account the amounts paid and agreed to be paid by the Everest Fincap Pvt. Ltd. total consideration of 41,00,00,000/- is being paid

for the property in question. As per the valuation report, the property is worth Rs.39,95,07,00/-. In view of the fact that the Banks have already received the amount from M/s. Everest Fincap Pvt. Ltd., and that the total consideration being paid by him is over and above the valuation property in question. Moreover, the Defendant No.1 is in liquidation since 1983 and also Defendant Nos.6 to 10 as well as the Applicant have consented for the sale, the property described in Annexure-A is directed to be sold to M/s. Everest Fincap Pvt. Ltd.

4. The DRT Receiver is directed to forthwith hand over the quiet and peaceful possession of the property in question to M/s. Everest Fincap Pvt. Ltd. The fees of DRT Receiver are quantified at Rs.1,00,000/- payable by Everest Fincap Pvt. Ltd. The security charges till today shall be borne by the Applicant and Defendant No.10 in proportion of their respective ration 7 : 5. The DRT Receiver shall stand discharged on handing over the possession and on receiving his fees as stated hereinabove and without

passing accounts."

It is not in dispute that the Appellant paid a sum of Rs.14 crores to the first Respondent. On 27th April, 2005 the Debt Recovery Tribunal issued a sale certificate in favour of the Appellants and possession was handed over to the Appellants by the receiver appointed by the Debt Recovery Tribunal. The conveyance was executed on 29th April, 2005 and the same was registered on 04th May, 2005.

5. On 12th September, 2005 the Respondent-official liquidator submitted a report to this court. On the basis of the report, this court passed an order directing the Appellants to pay a further amount of Rs.54.46 lakhs to the official liquidator for payment to the Mumbai Municipal Corporation. This court also permitted the Respondent to declare and pay a dividend @ 60 paise in a Rupee to all 2827 workers whose claims have been adjudicated. This court permitted the Respondent to declare and pay dividend @ 100 paise in a Rupee to all preferential creditors. The said amount of Rs.54.46 lakhs was paid by the Appellant on 22nd September, 2005 to the official liquidator. In the meanwhile, the Defendant No.7 in the suit filed by the United Commercial Bank

and an intervenor applied to the Debt Recovery Tribunal for setting aside the sale effected in favour of the Appellant. The Respondent- official liquidator was served with the notice of the said application. On 29th November, 2005, the learned Presiding Officer of the Debt Recovery Tribunal passed an order directing that order of confirmation of sale in favour of the Appellant passed on 31st March, 2005 shall stand set aside on the intervenor or the Defendant No.7 depositing a sum of Rs.45 crores plus Rs.50,000/- with the Tribunal within a period of two weeks from that date. The learned Presiding Officer passed an order that in case the said amount is deposited there will be auction of the property. Admittedly, neither the intervenor nor the Defendant No.7 paid the amount within the time fixed by the learned Presiding Officer of the Debt Recovery Tribunal. Being aggrieved by the said order dated 29th November, 2005, the Defendant No.7 preferred an Appeal before the Debt Recovery Appellate Tribunal. An Application for stay was made in the Appeal. While passing order dated 23rd December, 2005 on Application for stay made in the Appeal, the learned Chairperson of the Debt Recovery Appellate Tribunal noted that the Appellant had already assigned the property as a security to the HDFC Bank on 16th December, 2005. However, the Debt

Recovery Appellate Tribunal did not stay the order of confirmation of sale passed in favour of the Appellant. The Appellant and the HDFC Bank were restrained from creating third party interests in respects of the property sold to the Appellant.

6. The Appellant filed Company Application No.434 of 2006 in Company Petition No.01 of 1982 before the learned Company Judge. The prayers in the said application were for directing the official liquidator to make disbursement of the amount of Rs.14 crores deposited by the Appellant to the workers, ESIS, Collector and to all creditors of the said Company whose claims were adjudicated. Another prayer was for directing the Respondent to make payment of municipal taxes of Rs.54,60,14/- to the municipal corporation. The third prayer was for issuing letter of attornment to the existing occupants and tenants in the building informing them to pay rent/charges to the Appellant. A prayer was also made for directing the Respondent to make payment to the Appellant of all amounts received by him from the tenents/occupants of the property in question from 01st April, 2005 till the date of the order. A prayer was made for restraining the Respondent from recovering or receiving rent or occupation charges. A prayer was also made for

directing the Respondent to withdraw a letter addressed by the Respondent to the Registrar of companies raising an objection for registration of the charge created by the Appellant in favour of the HDFC Bank.

7. In the meanwhile on 15th December, 2005 this court permitted the Respondent to prefer an Appeal against the order of the Debt Recovery Tribunal for confirmation of the sale in favour of the Appellant. The Appellant filed Company Application No.338 of 2006. In the said Company Application a prayer was made for setting aside the ex-parte order dated 16th December, 2005 made by this court on the report of the official liquidator permitting the official liquidator to prefer an Appeal against the order of confirmation of sale in favour of the Appellant.

8. The learned single Judge by order dated 27th April, 2006 rejected the Application No.338 of 2006 by holding that even if a proceeding is filed by the Respondent -official liquidator on the basis of the order dated 15th December, 2005, all the contentions on merits are always open and are not concluded by order dated 15th December, 2005. On the same day, the learned single Judge disposed of the Company

Application No.434 of 2006 by directing the Respondent to make disbursement of the amount due to the workers and other statutory authorities. The learned single Judge directed the official liquidator to release a sum of Rs.28,40,820/- to the municipal corporation towards the property taxes. The learned Single Judge did not grant other prayers in the said Application by granting liberty to the Appellant to initiate proceedings on that behalf. The Appeal No.417 of 2006 is preferred for challenging order passed in Company Application No.434 of 2006 and the Appeal No.416 of 2006 is preferred for challenging order passed in Company Application No.338 of 2006.

9. Shri Aspi Chinoy, learned senior counsel appearing for the Appellants has taken us through the orders impugned in these Appeals. He submitted that the Respondent- official liquidator was all along aware about the order of sale passed by the Debt Recovery Tribunal and confirmation of sale by Debt Recovery Tribunal in favour of the Appellant-company. He submitted that the Respondent- official liquidator has never raised any objection to the sale of the property in favour of the Appellant. He further submitted that the Appellant has become the owner of the property on the basis of the sale deed executed in

favour of the Appellant which has been duly registered and therefore, the Appellant is entitled to act as the owner of the property and is entitled to collect the rent and occupation charges from the tenants/ occupants of the property. He submitted that the official liquidator had no authority to collect the occupancy charges after execution of conveyance in favour of the Appellant and therefore, he should be directed to pay said amounts collected by him to the Appellant. He submitted that the Respondent - official liquidator could not have raised objection before the Registrar of companies for entering the charge of HDFC Bank over the said property. He submitted that an Appeal is already pending before the Debt Recovery Tribunal for challenging the sale in favour of the Appellant and in the said Appeal the Debt Recovery Appellate Tribunal has declined to grant stay to the sale in favour of the Appellant. A only a limited interim relief has been granted restraining the Appellant from creating third party interests. He submitted that the learned single Judge ought to have recalled the order dated 15th December, 2005 permitting the official liquidator to challenge the sale by preferring an Appeal. He submitted that the Respondent has no locus to prefer any Appeal as the Respondent has accepted the sale in favour of the

Appellant by his conduct and is estopped from challenging the order of confirmation of sale in favour of the Appellant. He submitted that once this court grants permission to the Appellant to prefer an Appeal, it will be very difficult for the Appellant to canvass the submission regarding non-maintainibility of the Appeal at the instance of the Respondent-official liquidator before the Debt Recovery Appellate Tribunal. Shri S.H. Doctor, the learned Senior Counsel appearing for the Respondent supported the impugned orders. He submitted that the Respondent being a public officer is duty bound to point out the illegality in the sale effected in favour of the Appellant by the Debt Recovery Tribunal. By controverting the submissions of Shri Chinoy, he submitted that the Appeals deserve to be dismissed. Shri Madon, the learned Senior Counsel appearing for the HDFC Bank supported the Appellant.

10. We have considered the submissions. Appeal No.416 of 2006 arises out of order passed by the learned single Judge in Company Application No.338 of 2006. As stated earlier prayer in the said application is for setting aside order dated 15th December, 2005 passed by the learned single Judge on the report of the Respondent - official liquidator.

As a result of the said order passed by the learned Company Judge, the Respondent will be entitled to prefer an Appeal for challenging order of confirmation of sale passed by Debt Recovery Tribunal in favour of the Appellant. In this Appeal, the Appellant has not disputed the powers of the Respondent - official liquidator to file a legal proceedings with the permission of the learned Company Judge. When the learned Company Judge granted permission to the official liquidator to prefer Appeal before the Debt Recovery Appellate Tribunal, the merits of the controversy regarding the legality of the order of confirmation of sale were not adjudicated upon by the learned Company Judge. In paragraph No.15 of the impugned order, the learned Company Judge has stated thus:

> "There is much substance in the contentions of Shri Doctor that no rights of the applicant are being affected, muchless, prejudicially, by seeking of such permission. It is not as if the applicant is not in a position to urge that such permission being granted, the proceedings initiated by Official Liquidator, are not maintainable. It will be open to the applicant to point out whenever such

> proceedings are initiated by impleading itself as a party or otherwise that the Liquidator could not have initiated them and his conduct in the matter estopps him from doing so. It is not that these arguments are not open merely because this Court passed directions sought by the Liquidator on his report. All contentions on merits of all parties to such proceedings, are always open and are never concluded by such directions. It is essentially a matter between O.L. and the Court. Therefore, I do not find any reason to recall the order of 14th December, 2005. In these circumstances, there is no need to entertain other submissions of Shri Subramaniyam. These contentions are expressly kept open. As they touch merits of the matter, they can be raised before the appropriate Court in proceedings to be adopted by the O.L."

11. Thus, the learned Company Judge has himself clarified that the Appellant will be entitled to urge before the concerned authority that the proceedings initiated by the Respondent- official liquidator are not maintainable. In fact, the learned Company Judge

has clarified that all contentions of the Appellant-company in such proceedings which may be taken out by the Respondent on the basis of the permission granted by the learned Company Judge have been expressly kept open. Therefore, we find that there is no merit in Appeal No.416 of 2006.

12. While arguing Appeal No.417 of 2006 Shri Chinoy, learned senior counsel appearing for the Appellant submitted that the learned Company Judge has proceeded on erroneous footing that order dated 31st March, 2005 passed by the Debt Recovery Tribunal has been set aside. Our attention has been invited to order dated 29th November, 2005 passed by the learned Presiding Officer of Debt Recovery Tribunal -I, Mumbai. The said order is passed in common on the Application made by an intervenor and an application made by the original Defendant No.7. By the said order, the order of confirmation of sale passed in favour of the Appellant on 31st March, 2005 was set aside on the intervenor or the Defendant No.7 depositing a sum of Rs.45 crores plus Rs.50,000/- with the Debt Recovery Tribunal within period of two weeks. Consequential direction for re-sale of the property was also issued by the said order. Thus, there is no factual error in the order passed by the learned

Company Judge. The order dated 29th November, 2005 did not operate as it appears that requisite amount was not deposited either by the Defendant No.7 or by the intervenor.

13. The said order has been challenged by the Defendant NO.7 before the Debt Recovery Appellate Tribunal. In the said Appeal, by order dated 21st December, 2005 a limited interim relief has been granted restraining the Appellant or his mortgagee from dealing with the property by way of sale, mortgage and from making alterations or additions in any manner without prior permission of the Tribunal. Thus, in the said Appeal there is no order passed staying the operation of the order of confirmation of sale. The factual position which emerges today is that as of today the order by which the sale is confirmed in favour of the Appellant is not stayed by any competent authority or Tribunal.

14. It is true that the Respondent has been permitted to take out appropriate proceedings for challenging the order of confirmation of sale in favour of the Appellant and he will be entitled to apply for appropriate interim relief in the proceedings taken out by him. The question,

therefore, is whether the Appellant is entitled to any relief in Company Application No.434 of 2006.

15. Prayer (a) in the Application is for directing the Respondent to disburse the amount deposited by the Appellant to the workers, to ESIS, Collector and to other creditors. A sum of Rs.14 crores has been deposited by the Appellant with the Respondent in April 2005. On 12th September, 2005 on the report submitted by the Respondent- official liquidator, the learned Company Judge has directed the Appellants to deposit further amount of Rs.54.67 lakhs with the official liquidator. Accordingly, on 22nd September, 2005 the amount has been deposited by the Appellant. In the impugned order this court has noted that on 15th September, 2005 the official liquidator has been directed to disburse the amount deposited by the Appellant to the concerned workers. In fact, prayer clauses (a), (b), (d) and (e) of the report dated 12th September, 2005 have been granted. On 30th September, 2005 further order was passed by the learned Company Judge. By the impugned order the learned single Judge directed the Respondent- official liquidator to make disbursement of the amount due to workers as per the orders passed by this court earlier. The learned Judge also directed the Respondent to release a sum of

Rs.28,40,820/- to the municipal corporation out of the amount deposited by the Appellant. Therefore, prayers (a) and (b) of the Company Application No.434 of 2006 has been substantially worked out. So far as prayer clauses (c) to (e) are concerned, it is obvious that the Appellant wants to exercise all the rights as the owner of the property purchased under the Sale Deed dated 29th April, 2005. If the order confirming the sale in favour of the Appellants is not stayed as of today, in normal course Appellants are entitled to the said prayers with the modification that the Appellant is entitled to recover rent and occupation charges from 29th April, 2005. Even if proceedings are pending in the Debt Recovery Appellate Tribunal, it is obvious that all further actions of the Appellant will be subject to final outcome of the Appeals pending before Debt Recovery Appellate Tribunal. It must be noted here that we have confirmed order passed by the learned Company Judge which permits the Respondent-official liquidator to challenge the order of confirmation of sale passed in favour of the Appellant. It is obvious that the Respondent will be entitled to apply for appropriate interim relief before the Debt Recovery Appellate Tribunal. If the Respondent- official liquidator does not succeed in obtaining appropriate interim reliefs preventing the

Appellant from exercising the rights as owner of the property, obviously the relief in terms of prayer clauses (c) to (e) will have to be granted. However, as of today it is not possible to pass any order as the reliefs will have to be moulded after considering the interim order, if any, which may be passed by the Debt Recovery Appellate Tribunal in the proceeding filed by the Respondent.

16. It is not in dispute that on 29th April, 2005 the Registrar of Debt Recovery Tribunal executed a registered conveyance in favour of the Appellant and the name of the Appellant has been mutated in the property register card. It appears that the Appellant has created an encumbrance on the property in favour of the HDFC Bank. The Respondent addressed a letter to the Registrar of Companies intimating that the registrar of company should not register the charge created by the Appellant in favour of the HDFC Bank. Prayer (f) is for directing the Respondent to withdraw the said letter sent by him to the Registrar of Companies. As in case of prayers (c) to (e), the fate of clause (f) depends on the interim order which may be passed by the Debt Recovery Tribunal in the proceedings which are to be filed by the Respondent. Unless there is a prohibitory order passed by the Debt

Recovery Appellate Tribunal, it is obvious that the Appellants are entitled to reliefs in terms of prayer clauses (c) to (f) in Company Application No.434 of 2006. However, we are not passing any order in terms of said prayer clauses as of today as reliefs will have to be moulded in accordance with the order which may be passed by the Debt Recovery Appellate Tribunal in Appeal which may be preferred by the Respondent.

17. In view of this position we are inclined to modify the order passed by the learned Company Judge on Company Application No.434 of 2006 to the extent which prayer clauses (c) to (f) are rejected. We permit the Appellant to file a fresh Company Application after eight week before the learned Company Judge for grant of the said reliefs. Within the said period of eight weeks, the Respondent -official liquidator is expected to file appropriate proceeding before the Debt Recovery Appellate Tribunal and to apply for appropriate ad-interim/ interim reliefs. We are sure that as and when fresh Application is filed by the Appellant, the learned Company Judge will decide the same in the light of observations made by us in this judgment after considering the order, if any, which may be passed by the Debt Recovery Appellate Tribunal on the

Application for interim relief made by the Respondent.

18. Hence, we pass the following order:

(i) Appeal No.416 of 2006 is dismissed with no order as to costs.

(ii) Appeal No.417 of 2006 is partly allowed.

(iii) The impugned order dated 27th April, 2006 in Company Application No.434 of 2006 is modified to extent to which prayer clauses (c) to (f) have been rejected.

(iv) The Appellant will be entitled to file a fresh company application seeking reliefs in terms of prayer clauses (c) to (f) of Company Application No.434 of 2006 before the learned Company Judge after a period of eight weeks from today.

(v) If such application is made, the learned Company Judge will pass appropriate order in the light of observations made by us in this judgment after considering interim order, if any, passed by the Debt Recovery Appellate

Tribunal on Application for interim relief which may be made by the Respondent-Official Liquidator.

(vi) We make it clear that all contentions of the parties in the proceedings pending before the Debt Recovery Appellate Tribunal and in the proceeding which may be filed by the Respondent before the Debt Recovery Appellate Tribunal are expressly kept open and the said proceeding will be decided on its own merits without being influenced by any observations made by the learned Company Judge in the order passed in Company Application No.434 of 2006.

(vii) We make it clear that we have made no adjudication on issue of legality of the order passed by the Debt Recovery Tribunal by which the sale of the property has been confirmed in favour of the Appellant.

(vii) There will be no orders as to costs.

CHIEF JUSTICE

ABHAY S. OKA, J